

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)	
)	
KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION,)	
)	
COMPLAINANT)	CASE NO. 2014-00025
)	
v.)	
)	
LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY,)	
)	
DEFENDANTS)	

REPLY OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY TO KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION’S RESPONSE IN OPPOSITION TO THE SECOND MOTION TO DISMISS

Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) (collectively “the Companies”) submit this Reply to Kentucky Cable Telecommunications Association’s (“KCTA”) Response to the Companies’ Motion for Dismissal of the Complaint and a Declaration of Legal Obligations.

ARGUMENT

- 1. Because the Commission lacks the legal authority to order retroactive reductions in the Companies’ pole attachment rates, KCTA’s members will not be prejudiced by dismissal of KCTA’s Complaint.**

KCTA’s opposition to the Companies’ Motion to Dismiss is based upon the false premise that dismissal of KCTA’s complaint would deprive KCTA members “of an adjudication of whether the Companies’ prior costs support the current pole attachment rates” and “of the

opportunity to pay the correct rate dating back to the date of the Complaint.”¹ For the first time, KCTA’s Response reveals KCTA seeks retroactive refunds as a form of relief in this proceeding. In doing so, KCTA in effect seeks to amend its complaint to seek a form of relief which as a matter of law cannot be granted by the Kentucky Public Service Commission (“KPSC”).² As a matter of law the KPSC may only adjust rates prospectively. Because KCTA’s Complaint admittedly seeks relief that is beyond the KPSC’s statutory power to grant, dismissal of KCTA’s complaint will not prejudice KCTA or its members in any respect. KCTA and its members can pursue their claims for prospective changes of the Companies’ pole attachment rates in Case Nos. 2014-00371³ and 2014-00372.⁴

KCTA asserts that, despite the KPSC’s approval of the Companies’ current pole attachment rates after lengthy and lawful rate proceedings, these rates, nevertheless, were unlawful and unreasonable from their inception.⁵ It further alleges that as these rates were “not supported by the Companies’ costs at the time . . . [they] were instituted, KCTA members somehow are entitled to pay the corrected pole attachment rate dating back to at least January 24, 2014 – the date KCTA filed its Complaint.”⁶ At least one KCTA member has even taken the position that, pending a KPSC decision on KCTA’s Complaint, the member has no legal obligation to pay the Companies’ current pole attachment rates and continues to pay the prior

¹ KCTA’s Opposition to Second Motion to Dismiss at 4. *See also* Opposition to Second Motion to Dismiss at 7 (“[T]o the extent the pole attachment rates have been in effect since January 1, 2013, are found to be unreasonable based upon the Companies’ costs at the time the rates were instituted, KCTA members would be entitled to pay the correct pole attachment rate from the date of the Complaint, at a minimum.”).

² A review of KCTA’s complaint fails to reveal this new request for retroactive relief in the form of refunds in violation of the filed rate doctrine.

³ Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC filed Nov. 26, 2014).

⁴ Case No. 2014-00372, *Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates* (Ky. PSC filed Nov. 26, 2014).

⁵ KCTA’s Complaint ¶¶ 21-22.

⁶ KCTA’s Opposition to Second Motion to Dismiss.

rates for the pole attachment services.⁷ Incredibly, KCTA claims that the Companies are “suffering no harm” as a result of the member’s failure to pay the tariffed rates.⁸ An arrearage that presently exceeds \$880,000, and absent disposition of this issue, is likely to continue to grow in excess of \$1,000,000 by April 30, 2015 clearly harms the Companies’ financial condition. This member’s action is especially egregious when the number of pole attachments is not disputed; and the mathematical calculation of the bills based on KPSC-approved, tariffed rates is not disputed.⁹

This unreasonable position clearly conflicts with the integrated and comprehensive statutory scheme established in KRS Chapter 278. KRS 278.160(2) requires a utility to charge and collect - and its customers to pay - the rates set forth in the utility’s filed rate schedule. Where these rates are established by KPSC order, the rates continue in effect until (1) the utility provides the KPSC with 30 days’ notice of a proposed change in the rates¹⁰ or until (2) either the KPSC or a court of competent jurisdiction modifies or revokes the order. KRS 278.390 provides:

Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or in part, by order or decree of a court of competent jurisdiction.

While the KPSC may modify or revoke an earlier order as the result of a complaint, it may not do so retroactively. KRS 278.270 provides:

⁷ See KCTA Complaint, ¶ 24 (“Some of KCTA’s members have not paid the new pole rates implemented by KU and LG&E in January 13, 2013, [*sic*] and await a decision by this Commission as to what pole rates are just and reasonable.”). See also Memorandum in Support of the Companies’ Motion to Dismiss and A Declaration of Legal Obligations at 4.

⁸ KCTA’s Opposition to Second Motion to Dismiss at 3.

⁹ The dispute with the lawfully-approved and tariffed rates does not excuse the customers from paying their bills so long as their bills reflect the correct usage and the amount due is accurately calculated.

¹⁰ KRS 278.180(1).

Whenever the commission, upon its own motion or **upon complaint as provided in KRS 278.260**, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission **shall by order prescribe a just and reasonable rate to be followed in the future**. (emphasis added).

KRS 278.180(1) further demonstrates that changes in rates must be prospective by its requirement that a utility must provide the KPSC with at least 20 days' notice before the commission-ordered rate change can be placed into effect.¹¹

The Kentucky Court of Appeals has found this statutory scheme prohibits the KPSC from directing refunds of previously approved rates. In *Cincinnati Bell Telephone Co. v. Kentucky Public Service Commission*, 223 S.W.3d 829 (Ky.App. 2007), payphone service providers petitioned the KPSC to reduce the rates that several telecommunication companies assessed them for service access. After finding the rates in question failed to comply with Federal Communication Commission ("FCC") guidelines, the KPSC ordered prospective reductions in those rates. Upon the payphone service providers' petition for rehearing, the KPSC modified its decision to also require the telecommunication companies to refund the difference between the prior rates and the new rates retroactive to the date of the issuance of the FCC guidelines.

Reviewing the KPSC's decision, the Kentucky Court of Appeals found the KPSC's refund order unlawful and reversed. It held:

¹¹ KRS 278.180(1) states:

Except as provided in subsection (2) of this section, no change shall be made by any utility in any rate except upon thirty (30) days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect. However, the commission may, in its discretion, based upon a showing of good cause in any case, shorten the notice period from thirty (30) days to a period of not less than twenty (20) days. **The commission may order a rate change only after giving an identical notice to the utility**. The commission may order the utility to give notice of its proposed rate increase to that utility's customers in the manner set forth in its regulations. (emphasis added)

In light of the General Assembly's comprehensive ratemaking scheme, including only a narrowly defined circumstance under which refunds can be ordered, ***the filed rate can only be lawfully altered prospectively***. KRS 278.270, *supra*. Under the requirements of the statute, the rate the PSC authorized BellSouth to charge payphone service providers remained in full force and effect until the Commission modified it by its order of May 2003. Consequently, as a matter of law, BellSouth was never overpaid; no credits accrued; and no refunds were owed.

Id. at 839 (emphasis added). (According to the Court of Appeals, the narrow exception in which the KPSC may order refunds occurs under KRS 278.190(2) when the utility places the proposed change in rate in effect, subject to refund, following the expiration of the suspension period and KPSC then determines within the ten-month statutory time period that proposed rates are unreasonable.)¹²

In its response to the Companies' Motion, KCTA disingenuously asserts the *Cincinnati Bell Telephone Co.* decision supports the proposition that a filed rate may be reduced retroactively to the date that a complaint is filed with the KPSC.¹³ It does by taking one sentence of the eleven page decision entirely out-of-context. While the Court of Appeals states in *Cincinnati Bell Telephone Co.* that "the rate holds constant until a rate change is formally requested or a challenge to the rate is raised by an interested party,"¹⁴ KCTA fails to note that the Court expressly held that any KPSC-ordered rate change becomes effective only after the KPSC issues an order in favor of the challenging party and only from the date of such order forward. Moreover, KCTA conveniently fails to note that the Court declined to order a retroactive reduction of the contested rate to the date the payphone providers filed their petition with the

¹² *Cincinnati Bell Telephone Co.* at 838-839. The KPSC has found an additional exception exists where a party seeks the correction of clerical or mathematical errors within the time period for petitions for rehearing. *See Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2011-00036 (Ky. PSC Jan. 29, 2013).

¹³ KCTA's Opposition to Second Motion to Dismiss at 7.

¹⁴ *Cincinnati Bell Telephone Co.* at 839.

KPSC and instead held that reductions in the rate in question could commence no earlier than the date of the KPSC found for the payphone service providers.¹⁵

Aside from the KPSC's erroneous holding in Administrative Case No. 361,¹⁶ which the Kentucky Court of Appeals vacated in *Cincinnati Bell Telephone Co.*, the KPSC has consistently held that a change in an existing rate may be made prospectively only.¹⁷ KCTA cites no KPSC precedent in support of its position for retroactive revision of a filed rate based upon the filing of a complaint.¹⁸

¹⁵ *Id.* The FCC issued its guidelines on January 31, 2002. The payphone providers filed their petition with the KPSC on October 14, 2002. The KPSC issued the order for prospective rate reductions on May 12, 2003. See *Deregulation of Local Exchange Companies' Payphone Service*, Administrative Case No. 361 (Ky. PSC May 12, 2003). The Court of Appeals prohibited any refunds and limited reductions in rates to the period commencing May 12, 2003.

¹⁶ *Deregulation of Local Exchange Companies' Payphone Service*, Administrative Case No. 361 (Ky. PSC June 5, 2003).

¹⁷ See, e.g., *Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East, LLC and Verizon Access*, Case No. 2008-00203 (Ky. PSC Oct. 11, 2013) (holding that KPSC cannot retroactively establish a rate); *Office of Attorney General v. Atmos Energy Corporation*, Case No. 2005-00057 (Ky. PSC Feb. 9, 2007) ("We also agree with the AG that the imposition of a rate adjustment at the conclusion of this proceeding will not violate the prohibition against retroactive rate-making as any rate adjustment that might be ordered will be prospective only."); *Proposed Adjustment of the Wholesale Water Rates of the City of Cynthiana, Kentucky*, Case No. 99-300 (Ky. PSC Apr. 24, 2000) ("KRS Chapter 278 does not authorize the Commission to establish rates retroactively."); *Big Rivers Electric Corporation's Proposed Mechanism to Credit Customers Amounts Recovered in Judicial Proceedings Involving Fuel Procurement Contracts*, Case No. 94-453 (Ky. PSC Feb. 21, 1997) ("While KRS 278.260(1) and KRS 278.270 give the Commission authority to investigate existing rates and establish new rates, the power is limited to prospective rate changes.").

¹⁸ In addition to its selective quotation of *Cincinnati Bell Telephone Co.*, KCTA also selectively quotes *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) to support the proposition that a filed rate is not enforceable if the regulatory agency finds the rate to be unreasonable. The U.S. Supreme Court in *Maislin Indus.*, however, does not expressly address the issue of retroactive refunds. The portion of the decision that KCTA quotes involves a general discussion of the filed rate doctrine. In this discussion, the Court states:

The filed rate doctrine, however, contains an important caveat: The filed rate is not enforceable if the ICC finds the rate to be unreasonable. See [*Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915)] *Maxwell*, *supra*, at 97 (filed rate applies "unless it is found by the Commission to be unreasonable") (emphasis added); see also *Keogh [v. Chicago & Northwestern R. Co.]*, 260 U.S. 156 (1922)], *supra*, at 163 ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate") (emphasis added). The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected, as commanded by §§ 10761 and 10762, the requirement that rates not be discriminatory, see § 10741, and the requirement of § 10701 that carriers adopt reasonable rates and practices.

By its December 20, 2012 Orders in Case Nos. 2012-00221¹⁹ and 2012-00222,²⁰ the KPSC established the Companies' current pole attachment rates for service rendered on and after January 1, 2013 and directed the Companies to file rate schedules that reflected these rates. KRS 278.160(2) requires the Companies to charge and collect these rates and KCTA's members to pay these rates for pole attachment services. The filing of KCTA's complaint does not alter these duties nor does it make KCTA's members eligible for retroactive reduction of those rates. KRS 278.270 limits any relief that KCTA may be awarded to a prospective change in the pole attachment rate. As the KPSC can award such relief in Cases No. 2014-00371 and 2014-00372, KCTA will not suffer any prejudice from the dismissal of Case No. 2014-00025.

As to KCTA's contention that dismissal of the Complaint would prejudice its members because they would be "unable to determine the reasonableness of the Companies' current rates based on the costs in effect at the time the rates were instituted,"²¹ KCTA conveniently ignores that it and its members had ample legal notice of the earlier rate proceedings and ample opportunity to intervene and examine the Companies' current pole attachment rates in Case Nos. 2012-00221 and 2012-00222, but chose not to do so.²² KCTA's claim of prejudice in effect is an amended request for special and unlawful treatment – to reexamine and question the reasonableness of rates that have been assessed for services already received and to pay a rate

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Id. at 128. In its discussion, the Supreme Court addresses the same well-established legal doctrine that the Kentucky Court of Appeals discusses and applies in *Cincinnati Bell Telephone Co.*

¹⁹ Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC Dec. 20, 2012).

²⁰ Case No. 2012-00222, *Application of Louisville Gas and Electric Company for an Adjustment of Its Electric Gas Rates, a Certificate of Public Convenience and Necessity, Approval of Ownership of Gas Service Line, and a Gas Line Surcharge* (Ky. PSC Dec. 20, 2012).

²¹ KCTA's Opposition to Second Motion to Dismiss at 6.

²² In its complaint, KCTA admits it had notice of the Companies' applications in Case Nos. 2012-00221 and 2012-00222, but "mistakenly understood that these applications sought only increases in electric rates, not pole attachment rates." KCTA Complaint, ¶ 18. This assertion contrasts sharply with the expressed and plain language contained in the Companies' published notices; each expressly stating the proposed changes in the pole attachment rates.

that differs from the filed rate in effect when service was provided. Dismissal of the Complaint, therefore, will not result in any prejudice to KCTA's members but will ensure that all ratepayers are treated in a fair and equal manner.

2. Consolidation of KCTA's Complaint for retroactive relief with KCTA's claims for prospective relief in Case Nos. 2014-00371 and 2014-00372 will create confusion and unnecessary expenditure of resources and will not result in the economic disposition of the proceedings.²³

Notwithstanding KCTA's claim for illegal relief in the form of retroactive reduction of filed rates and contrary to KCTA's claim that consolidation of KCTA's Complaint with the Companies' current rate case proceedings would "conserve time, energy, and resources of the parties and the Commission,"²⁴ consolidation of the proceedings is likely to result in embedding a legal error into the rate cases, unnecessary confusion and a muddling of the record. KCTA ignores key differences in the nature of the proceedings that make consolidation problematic and would likely require the parties to expend far greater resources.

First, KCTA's motion, if granted, would require consolidation of the Companies' rate proceedings. While the Companies are commonly-owned, the Companies' operations vary, as evidenced by their separate applications to change their rates. The KPSC has never consolidated any of the Companies' rate case proceedings, but has chosen to treat each application separately and to develop a separate record for each. Consolidation of the rate case proceedings with the Complaint proceeding will complicate discovery, will result in the creation a massive and unwieldy record, and will make a final decision much more difficult to render.

²³ This section addresses certain arguments set forth in KCTA's response to the Companies' Second Motion to Dismiss. KCTA subsequently restates these arguments in its Motion to Consolidate. Having already expressed their position on the issue of consolidation in this Reply and wishing to avoid the submission of duplicative and repetitive pleadings to the KPSC, the Companies will not submit a response to KCTA's Motion to Consolidate.

²⁴ KCTA's Opposition to Second Motion to Dismiss at 4.

Second, KCTA's Complaint for retroactive ratemaking and the Companies' rate applications involve a review of the Companies' financial conditions over two distinct and widely separate periods of operation. The Companies' rate applications are based upon a forward-looking test period that runs from July 1, 2015 to June 30, 2016. These proceedings thus focus on the Companies' future costs to provide service. In its Complaint, KCTA alleges that the "pole attachment rates the Companies have charged since January 1, 2013 are not supported by the Companies' costs that were in effect at the time the rates were instituted."²⁵ KCTA's Complaint thus requires a review of the Companies' financial condition on and before January 1, 2013 which is entirely irrelevant to the evidence presented in the Companies' rate applications.

The current proceedings differ greatly from those of Case No. 9163,²⁶ which KCTA cites in support of consolidation. In that proceeding, a customer filed a complaint seeking a prospective reduction in Big Rivers Electric Corporation's ("BREC") rates. Within days of the filing of the customer's complaint, BREC applied to the KPSC for adjustment of rates. The customer then moved for consolidation which the KPSC granted. Unlike the current proceeding, the complainant in Case No. 9631 neither requested retroactive rate relief nor sought to relitigate the results of a prior rate proceeding. Such is clearly not the case with KCTA's Complaint and the Companies' rate applications.

In summary, consolidation of KCTA's Complaint proceeding for the unlawful retroactive reduction of filed rates with Case Nos. 2014-00371 and No. 2014-00372 will not promote an economical and expeditious disposition of the three proceedings but will unduly and

²⁵ *Id.* at 3.

²⁶ *Big Rivers Electric Corporation's Notice of Changes in Its Rates for Electricity Sold to Member Cooperatives*, Case No. 9163 (Ky. PSC Dec. 28, 1984).

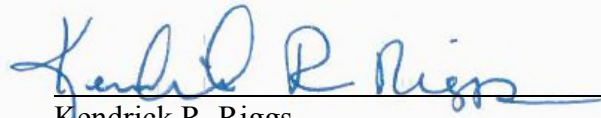
unnecessarily complicate those proceedings, produce an large, confusing and unwieldy record, and likely result in the expenditure of greater resources than if the matters were separately resolved.

CONCLUSION

KCTA's Complaint should be dismissed for the reasons stated in this record. As the KPSC lacks the statutory or other legal authority to grant retroactive reductions in the filed rates that KCTA requests in the Complaint and as any prospective relief regarding those fees may be sought in Case Nos. 2014-00371 and 2014-00372, dismissal of KCTA's Complaint will not prejudice KCTA's members. Consolidation of KCTA's Complaint for retroactive reduction of filed rates with Case Nos. 2014-00371 and 2014-00372 will not promote the economic and expeditious disposition of the three proceedings, but only produce a confusing, unwieldy and muddled record, unduly complicated the proceedings, and require the unnecessary and inefficient expenditure of resources by the KPSC and all parties on litigating an unlawful claim for the retroactive reductions in filed rates.

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Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In accordance with 807 KAR 5:001, Section 8, this is to certify that Louisville Gas and Electric Company's December 29, 2014 electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing has been transmitted to the Commission on December 29, 2014; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that the original in paper medium is being mailed by first class U.S. mail, postage prepaid, to the Commission on December 29, 2014.



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